IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 670 OF 1991.

1. Mr.John Anthony Fernandese,
s/o. Reg Fernandese, House No.910,
Medant Cortalim, Goa, Vasco D'Gama.

2. National Insurance Co.Ltd.,
3 Middleton Street, Calcutta. .... Appellants.

Versus.

Shri Bhikaji Janu Mali,
R/o.BIT Chawl, (Chinch Bunder) No.7,
IInd floor, Room No.32, Dr.Maheshwari
Road, Bombay 400 009. .... Respondent.

Shri M.B.Kotak for the Appellants.

Shri Lokesh holding for Shri G.S.Hegde for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 28th March, 2006.

ORAL JUDGMENT.

1. Heard Shri Kotak for the Appellants and Shri Lokesh for the Respondent. The Appeal is filed by the owner of the scooter involved in the accident and the Insurer of the scooter.

2. According to the case of the Respondent, who is the original claimant, on 22nd February 1989 at about 7.15 p.m. he was proceeding towards V.T.Station. He was employed in the General Post Office at the relevant

time. When he was crossing the road from East to West, the scooter bearing No.GDJ-6369 came at very high speed from the southern direction and knocked him down. As a result thereof he sustained fractures. According to him the rider of the scooter took him to the Naval Hospital for treatment. From Naval Hospital he was taken to K.E.M.Hospital.

3. Written statement was filed by Appellant No.1 contending that he is a resident of Goa and he never brought his scooter to Bombay. The Tribunal did not accept the defence and passed an Award in favour of the Respondent.

4. Shri Kotak appearing for the appellants submitted that the Police took Appellant No.1 to the residence of the Respondent alongwith photograph of the scooter. However, the Respondent stated that he was not the person who has caused the accident. He also stated that colour of the scooter shown in the photograph is the same but the registration number as seen from the photograph is different. He submitted that this aspect was admitted by the Respondent in his cross-examination. He pointed out that the learned Member of the Tribunal has recorded the said admission of the Appellant in his judgment. He submitted that the Appellant has stepped

into the witness box and proved that at the relevant time the appellant was in the State of Goa along with his scooter and he attended the baptism ceremony of his nephew at Gurpallim in Goa. He pointed out that necessary evidence has been produced by the Appellant No.1. He submitted that inspite of the cogent evidence led by the Appellants, the Tribunal has recorded a finding regarding the involvement of the scooter of Appellant No.1, whereas on the basis of the said evidence the claim petition ought to have been dismissed.

5. The learned Advocate for the Respondent supported the impugned Judgment and Award. He pointed out that the Respondent has filed cross-objection. He submitted that proper compensation on account of loss of salary was not awarded. He pointed that there was evidence to show that the Respondent suffered 30% of disability. He pointed out that a sum of Rs.12,000/- awarded on account of pain and suffering is extremely on the lower side.

6. I have considered the submissions. Reliance was placed by Shri Kotak on an alleged admission of the Respondent. The said admission reads thus:

> "After I went home from the hospital, police had brought my place a person and asked me whether that was the scooter rider and I was also shown the photograph of the scooter. I then told the police that was not the person who was the scooter rider and the scooter appearing in the photograph bearing the registration as appearing in the photograph was not that scooter. I now see the portion as 1.1.1988 to 22.2.1988."

He also invited my attention to the deposition of Appellant No.1 in this context. The Appellant No.1 has stated thus:

> "I was shown to the Applicant and he answered that I was not the person who caused the accident. Thereafter he was shown the photograph of my scooter which I had brought and then the applicant said that though the colour of the scooter is the same but registration number appearing in the photo is not the same which was the registration number of the scooter which dashed him.
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> (Note: Subject to the question of admissibility

of this oral statement of the applicant it is recorded as previous oral statements made long after the accident are not admissible unless they are reduced to writing)."

Much capital was tried to be taken by Shri Kotak on the statement of the Respondent that Appellant No.1 was not the person who was driving the scooter. In my view the said statement will not help the Appellant. It was not at all the case of the Respondent that the Appellant No.1 was riding the scooter. In the cross-examination the Respondent has stated that he had informed the Police that a Sikh person was the rider of the Scooter. That is the reason why the Respondent stated in his cross-examination that Appellant No.1 was not the person who was the rider of the scooter. Much capital was also tried to be taken by the learned Advocate for the Appellant on the failure of the Respondent to identify the school when photograph was shown to him by the Police. In this connection it will be necessary to refer to the evidence of D.W.2 S.K.Shinde who is the Police Sub-Inspector of the Traffic Control Department. He has stated in his examination-in-chief that the registration number of the scooter is not visible in photograph which was shown to the Respondent. Now this the explanation for the statement made by the Respondent

that the scooter appearing in the photograph shown to him was not the scooter involved in the accident. It must be noted here that when the Police brought Appellant No.1 to the Respondent for identification, Respondent avoided identification by stating that Appellant No.1 was not the person who was riding the scooter. However, he came out with a different version in his evidence. The case of the Respondent as projected from his oral testimony is that after he fell down as a consequence of the dash given by the scooter, he noted the scooter number on his palm. The F.I.R. has been registered on 22nd February 1988 at 1.30 a.m. In the said F.I.R. the Respondent has mentioned the number of the scooter. In fact in the F.I.R. he has described the person with reference to his appearance, age, height etc. He has stated that the person appeared to be a Sikh person though he was not having beard, thus statement of the Respondent as regards the involvement of the vehicle of Appellant No.1 was not at all an after-thought. As stated earlier when Appellant No.1 was taken to the Respondent by the Police, he honestly stated that the Appellant No.1 was not the person who was riding the scooter. The evidence which is led by the Appellant No.1 even if accepted as it is can establish that the Appellant No.1 was not in Mumbai on the date of the accident. However, the said aspect

cannot be ignored as it was the case of the Respondent that it was Appellant No.1 who was driving the scooter.

7. The learned Member of the Tribunal had an opportunity to record the evidence and note the demeanour of the witnesses. The Tribunal has appreciated the evidence and has accepted the case made out by the Respondent regarding the involvement of the scooter owned by Appellant No.1. Therefore, this Court should be very slow to interfere with the finding of fact as regards the involvement of the scooter belonging to the Appellant No.1 in the accident, more so in view of the discussion which I have made in the foregoing part of the judgment. Hence no fault can be found with the finding recorded by the learned Tribunal regarding the involvement of the scooter owned by the Appellant No.1.

8. As far as the injuries sustained and the pain and sufferings undergone by him is concerned, the version of the Respondent is not at all contested by the Appellants.

9. Turning to the cross objection filed by the Respondent, the evidence on record shows that the salary received by him at the relevant time was Rs.980/- per

month. The Certificate is at Exh.13A. The Respondent resumed duty on 1st September 1989. In fact the Tribunal observed that the evidence of the Respondent is not clear on the point whether from 1st August 1988 to 1st January 1989 he was prevented from performing duties because of the injury. Notwithstanding this fact, taking the salary of the Respondent at Rs.980/- a sum of Rs.5145/- has been awarded on account of loss of salary. There is some justification in the submission made by the learned Advocate appearing for the Appellant that no amount has been awarded on account of conveyance expenses. In my view without there being any positive evidence regarding the actual sum of salary, the Tribunal has awarded a sum of R.5145/- for loss of salary and a sum of Rs.1580/- for special diet. In view of this decision, it is not necessary to grant any enhancement towards medicine expenses. A submission was made that the Respondent has suffered a permanent disability of 30%. He suffered three fractures. The medical certificate at Exh.14 issued by the Medical Officer of the KEM Hospital is to the contrary. It records only one fracture and a 30% temporary disability. The injury described in the certificate reads as under:

"Lt. Trimalleslar potts fracture
(pronation laterel otation injury.)"

On account of pain and suffering the Tribunal awarded a sum of Rs.12,000/-. Considering the injury certificate no fault can be found with the compensation awarded under the said heading.

10. In my view the Appeal and the cross-objection must fail. The First Appeal No.670 of 1991 is dismissed. The Appellants are directed to pay costs of this Appeal to the Respondent. Cross-objection is dismissed with no order as to costs.

Judge.